

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NO. 2018-163-E

In Re:)	
)	
SolAmerica SC, LLC and Edgefield County)	
S1, LLC,)	
)	
Complainants,)	
)	
vs.)	MOTION TO DISMISS THE
)	COMPLAINT REQUESTING
South Carolina Electric & Gas Company)	MODIFICATION
)	
Defendant/Respondent.)	
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Pursuant to 10 S.C. Code Ann. Regs. § 103-829(A) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant/Respondent South Carolina Electric & Gas Company (“SCE&G”), hereby moves for an order of the Public Service Commission of South Carolina (“Commission”) dismissing the Request for Modification (“Complaint”) filed by solar developer Complainant/Petitioner SolAmerica SC, LLC and Edgefield County S1, LLC (collectively “Complainants”). As noted in SCE&G’s previously filed Response in Opposition to Complainants’ Request for Modification, additional extension of the already amended Milestones is improper under Section 6.2 of the Interconnection Agreement between SCE&G and Complainants (“IA” or “Agreement”). The Complaint requesting modification sets forth a vague basis for modification that is not supported by fact or law and does not allege a claim against SCE&G.

BACKGROUND

Complainants filed a Request for Modification of the IA on or about May 9, 2018, which sought to extend certain Milestones under the IA, ultimately affecting the in-service date. SCE&G petitioned to intervene in the matter and filed its Response in Opposition to the Request for Modification on May 21, 2018. The Commission issued an Order on June 6, 2018, where, among other things, the Commission noted that it construes the Request for Modification and Motion to Maintain the Status Quo as “Complaints against the utility.” Because the Commission construes Complainants’ filings as Complaints, SCE&G is now converting its Response in Opposition to the Request for Modification to a Motion to Dismiss to conform procedurally. SCE&G incorporates its Response in Opposition to the Request for Modification in its entirety in the instant Motion to Dismiss.

Though the Commission has ordered the Complainants’ Request for Modification held in abeyance until the scheduled hearing on the matter, additional deadlines and requirements continue to pass under the IA. Complainants may further breach the IA if they do not complete the Milestones set forth in the IA, including the requirement that the site be cleared and graded. Ex. 1 at App. 4 in Id. 276148, Docket No. 2018-163-E. In the event that Complainants default under the terms of the IA, and absent alternate action or order from the Commission, SCE&G shall provide Complainants a notice of default and opportunity to cure.¹ *Id.* at § 7.6

ARGUMENT

A motion to dismiss brought under Rule 12(b)(6) tests the legal sufficiency of a complaint. A court should dismiss a complaint for failure to state a claim upon which relief can be granted if it is clear that no relief could be granted under any set of facts that could be proved

¹ In the event Complainants default under the IA, SCE&G will follow the notice provisions of the IA and it will also provide this Commission and the Office of Regulatory Staff with a copy of any communications since this matter is before the Commission.

consistent with the allegations. *Slack v. James*, 356 S.C. 479, 482, 589 S.E.2d 772, 773-74 (Ct. App. 2003). In this matter the Complaint requesting modification of the IA is vague, unsupported by law or fact, and fails to set forth a valid basis for relief under the terms of the IA.

As set forth more fully in SCE&G's Response in Opposition to the Request for Modification, Complainants seek to amend the Milestones of the IA pursuant to Section 12.12 of the IA. Section 12.12 gives either party the right to make a unilateral filing with the Commission seeking modification of the IA with respect to any rates, terms and conditions, charges, or classifications of service. Review pursuant to Section 12.12 must adhere to Section 6.2 of the IA, which limits extension of Milestones, including when a prior extension has been provided.² Section 6.2 provides:

The Party affected by the failure to meet a milestone shall not unreasonably withhold agreement to such an amendment unless (1) it will suffer significant uncompensated economic or operational harm from the delay, (2) the delay will materially **affect the schedule of another Interconnection Customer** with subordinate Queue Position, (3) **attainment of the same milestone has previously been delayed**, or (4) it has reason to believe that the **delay in meeting the milestone is intentional or unwarranted** notwithstanding the circumstances explained by the Party proposing the amendment.

(emphasis added)

Section 6.2 demands the smallest impact on the in-service deadline by requiring Complainants provide immediate notification of the reasons for a failure to meet a Milestone and the earliest resolution date. With reference to the arguments SCE&G raised more fully in its

² Section 6.2 provides for specific treatment of Milestones under the IA and is not in conflict with the broader amendment principles of Section 12.12. Even if in conflict, the long-standing principles of contract interpretation dictate that general contractual provisions must yield to more specific ones. 11 *Williston on Contracts* § 32:10 (4th ed.) (“When general and specific clauses conflict, the specific clause governs the meaning of the contract.”); *see also S. Ry. Co. v. Coca Cola Bottling Co.*, 145 F.2d 304, 307 (4th Cir. 1944) (“When a particular occurrence falls within a general clause of a contract, and also within the precise terms of a specific provision of the same contract, a presumption arises that the specific . . . provision, rather than the general, is controlling.” (citing *Deep Vein Coal Co. v. Chicago & E.I.R. Co.*, 71 F.2d 963, 964-65 (7th Cir. 1934))).

previously filed Response, the IA should not be amended or extended for a second time and the Complaint requesting modification should be dismissed based on the following:

- Further delay may impact other Interconnection Customers in the queue;³
- Complainants seek extension of a Milestone they previously extended;
- Complainants' failure to meet Milestone 4 is intentional or unwarranted; and
- Complainants' have failed to propose the earliest date by which they can meet the Milestone.

Based on the facts as pled and alleged by Complainants, the Commission should dismiss the Complaint. Complainants offer no facts or justifications for why SCE&G or the Commission should ignore the policies expressed in the South Carolina Generator Interconnection Procedures, Forms, and Agreement and contained in Section 6.2 of the IA. The Complaint is not supported by law or fact and fails as a matter of law and therefore should be dismissed.

CONCLUSION

For the reasons set forth above, Complainants' Complaint seeking modification of the IA should be dismissed.

³ The South Carolina Generator Interconnection Procedures, Forms, and Agreements carefully considers the impact of extending Milestones. Its treatment is similar to that of the Federal Energy Regulatory Commission, whose policy is well documented: Extensions of Milestones may present harm to later queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs necessitated by the removal of the project from the interconnection queue at a later date. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198, 62,108 (2014) (stating the Commission's goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"); *Pac. Gas & Elec. Co.*, 146 FERC ¶ 61,120, 61,518 (2014) (holding that the Commission would not extend a milestone timeline when a utility had already correctly followed the default and termination procedures in its IA); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114, 61,709 (2013) (holding that even when there are no other customers currently queued behind a tardy interconnection customer, the *potential* for the interconnection customer's tardiness to negatively impact hypothetical future customers may be enough to justify a utility's refusal to extend an IA's milestones).

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

s/ J. Ashley Cooper

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